

Supreme Court, U. S.

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No. 76-98

MICHAEL RODAK, JR. CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1976

ROBERT J. BARANOV AND WORLD MAILING SERVICE, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1976. A timely petition for rehearing was denied on June 23, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court's refusal to grant a mid-trial continuance constituted a denial of due process.
2. Whether the advertising brochures at issue here were properly found to be obscene.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of mailing obscene materials, in violation of 18 U.S.C. 1461. Each was fined \$40,000. The court of appeals affirmed (Pet. App. A).

The parties stipulated at trial that petitioner Baranov was president of petitioner World Mailing Service, Inc., and that the mails were knowingly used by petitioners to transport the brochures at issue here (Tr. 20). The brochures advertise various books, magazines and films described as "hard porno action," "erotic smut books," and the "world's dirtiest sex films" (Gov. Exs. 3, 4, 17). The brochures contain explicit pictures of male and female genitals and depict actual or simulated fellatio, sodomy and intercourse.

ARGUMENT

1. Petitioner first contends (Pet. 11-17) that the court's refusal to grant a mid-trial continuance pending the arrival of two defense witnesses was an abuse of discretion denying him a fair trial.

The parties stipulated at the outset of the trial to all facts placed in issue by the indictment, except whether the materials referred to in the indictment were obscene (Tr. 19-21). The government called two witnesses who had received brochures from petitioners via the mails (Tr. 22-44). The materials were then shown to the jurors and the government rested (Tr. 44-47). After a luncheon recess, petitioners' counsel informed the court that he had one witness ready to testify that afternoon and that two additional witnesses would arrive that evening to testify the following morning.¹ The court responded by noting that

¹Defense counsel stated that one of the witnesses was a psychiatrist and the other was a psychologist. Apparently, both witnesses would have testified concerning whether the brochures appealed to prurient interests (Tr. 50; see Pet. 12-13).

the trial had been set in advance and that witnesses had to be available at the time they were needed (Tr. 48).

After having presented a witness who testified about a survey of the Washington, D.C., area concerning attitudes regarding sexually explicit materials (Tr. 51-97), petitioners' counsel informed the court that no other defense witnesses were available at that time (Tr. 101). The court stated that the defense had had ample opportunity to have additional witnesses present and apparently had decided not to do so. The court also stated that pretrial conferences in other cases had been scheduled for the following day and that "this Court cannot try cases at the convenience of the lawyers and at the convenience of the witnesses" (Tr. 102). The court therefore denied the defense request for a continuance from 4:00 p.m. to the following morning (Tr. 105-106). The case was submitted to the jury at 6:58 p.m. (Tr. 133); the jury returned its verdicts at 2:20 p.m. the following day (Tr. 151).

It is essential to the expeditious and orderly administration of justice that a trial court be permitted to control its own docket and to require that cases proceed in a timely manner. *United States v. Inman*, 483 F. 2d 738, 740 (C.A. 4), certiorari denied, 416 U.S. 988. Where, as here, due diligence is not exercised to ensure that witnesses are available when needed, it is within the scope of a trial court's discretion to deny a request for a continuance. See *Ungar v. Sarafite*, 376 U.S. 575, 589; *United States v. Harris*, 436 F. 2d 775, 777 (C.A. 9), certiorari denied, 402 U.S. 981. No facts are disclosed by the present record warranting the conclusion that the court here abused its discretion in requiring the defense to proceed despite the absence of two witnesses whom it had planned to call.

Government counsel apparently had informed defense counsel prior to trial that the court required witnesses to be available when needed (Tr. 101-102). Petitioners

urge, however, that the defense had not acted unreasonably because they believed that the witnesses in question would not be needed until the second day of trial (Pet. 13-14). But since the parties had stipulated to all elements of the offenses with which petitioners had been charged, except whether the materials were obscene,² it should have occurred to the defense that the government's presentation would be brief and that any defense witnesses would be called on the first day of trial.³

2. Petitioners also contend (Pet. 17-23) that the brochures at issue are not obscene. The jury here concluded to the contrary, pursuant to instructions from the court that petitioners do not challenge. Both the trial court and the court of appeals also examined the brochures and declined to upset the jury's verdict. There is thus no reason for further review by this Court. Petitioners' assertion that the brochures do not contain " 'patently offensive', 'hard core', 'out and out' depictions which leave nothing to the imagination" (Pet. 22) fails to acknowledge that the brochures explicitly depict actual or simulated fellatio, sodomy and intercourse. Transportation through the mails of such materials is clearly subject to proscription. See, e.g., *Miller v. California*, 413 U.S. 15, 25.

²We have been advised by the government's trial counsel that the parties had agreed to the stipulation at least one week prior to trial.

³Petitioners suggest (Pet. 13-14) that the expense of obtaining expert witnesses requires a relaxation of the normal rules governing mid-trial requests for continuances in circumstances such as those presented here. While we are sympathetic to the financial considerations that may have led the defense to follow the course it did here, other considerations also are entitled to weight—including the costs to the judiciary and to the prosecution if trials are unreasonably delayed. Had petitioners been concerned about the expense of needlessly having expert witnesses available, they should have brought that concern to the court's attention and sought the court's advice in accommodating the various interests at stake.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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